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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

E.S., Petitioner, v. THE SUPERIOR COURT OF CONTRA COSTA COUNTY, Respondent; CONTRA COSTA COUNTY CHILDREN & FAMILY SERVICES BUREAU et al., Real Parties in Interest.	A147131 (Contra Costa County Super. Ct. Nos. J14-00006, J14-00301)

E.S. (Mother) petitions for an extraordinary writ under California Rules of Court, rule 8.452,[1] to halt a scheduled hearing to consider terminating her parental rights over her two children, I.S. and A.S., under Welfare and Institutions Code section 366.26.[2] We conclude there is substantial evidence to support the court's orders and deny the writ.

BACKGROUND

This family came under scrutiny by Contra Costa County Children & Family Services Bureau (Bureau) at the end of 2013 when the Bureau began receiving reports of concern for the safety of I.S., the older child. The first reporter told the Bureau, at age

[1] Citations to rules are to the California Rules of Court.

[2] Statutory references are to the Welfare and Institutions Code unless otherwise indicated.

one-and-a-half, I.S. had been seen at the hospital within a two-week span with multiple injuries: scratches and bruises to his face, a broken leg, and a gash to the scalp. When asked, Mother explained the head injury occurred when I.S. fell off a slide, and the broken leg happened when he was jumping on a trampoline with older children.

The first unidentified reporter also said Mother has "anger issues" and "[w]hen I.S. was a newborn mother physically picked [him] up and threw him around." The reporter also said Mother drank vodka while nursing I.S. The reporter expressed the opinion that Mother suffers from "extreme reactive disorder."

Another report came in on January 2, 2014, alerting authorities to the same injuries, plus an eye injury in which the white part of I.S.'s eye was "all 'bloody.' " Mother later explained that I.S. accidentally pushed a toy broom into his own face. This reporter also said Mother had "evaded CFS reports in Placer County & Sacramento County," was "previously homeless," and had a history of drug and alcohol use.

Having learned that Mother may have been under investigation in Placer County, the Bureau's social worker contacted a social worker there, who told her there had been a report when I.S. was six months old that he sustained a bump on the head, which seemed unusual at his young age. They suspected the bump occurred when Mother got into a physical altercation with another person while holding the baby in her arms. Mother was advised to take I.S. for medical treatment but failed to do so. The Placer County social worker gave Mother hotel and taxi vouchers, but within a couple of days Mother had vacated the hotel, and the social worker lost contact with her. The Bureau suspects Mother moved from Placer County to Concord to hide from authorities and to hinder their investigation. The Placer County contact also noted there had been a report that Mother left I.S. with drug users as babysitters.

Mother, who was pregnant with A.S., moved to Concord around November 2013. On January 3, 2014, the Bureau's social worker visited the home where she was living as one of several roommates of the homeowner. The social worker noted a strong odor of marijuana in the house. Mother admitted to the social worker she smoked marijuana "occasionally." I.S. was detained that day by the police at the social worker's request.

Four days later, the Bureau filed a petition under section 300 alleging Mother had failed to protect I.S., and he was at risk due to her substance abuse and mental health issues. (§ 300, subd. (b).) The court ordered I.S. detained, finding Mother was a flight risk.

The Bureau's investigation revealed that Mother had been born in Russia and had been abused physically, sexually and emotionally by her biological father. Her father abandoned her at a bus stop when she was six years old, and from there she went to a Russian orphanage where she remained until age eight or nine. As a result, she had been diagnosed with post-traumatic stress disorder (PTSD), reactive attachment disorder,[3] and post-partum depression at different times in her life.

Mother was adopted by an American family, but she had a rocky relationship with her adoptive mother. Mother believed this was because she continued to harbor a grudge against her birth mother for failing to protect her from her biological father. Mother's adoptive parents were "extremely religious," and it had become a point of friction in her relationship with them. They home-schooled Mother until she was 16. She then entered a public high school, but her adoptive mother reported that she had behavioral and emotional issues. The adoptive parents kicked Mother out of the house when she was 18 because she would not follow their rules. After leaving high school just before graduating, Mother got work as a stripper and often supported herself in that way after that.

She met I.S.'s father, M.H., when she was working as an exotic dancer in San Francisco, as he worked at the same club. Although she was in love with M.H., he was involved with at least one other woman, he had five children, and she realized they had no future together. DNA testing established M.H.'s paternity, but M.H. had never met I.S. and was not involved in his life up to the time the dependency was initiated. There

[3] According to Mother and to the social worker's report, reactive attachment disorder is a disorder of childhood and adolescence, and the diagnosis does not apply to adults.

was some suggestion at the outset of the case that M.H. might be interested in taking custody of I.S., but he has remained largely uninvolved since then.[4]

Mother's own adoptive mother, K.S, did her no favors in discussing the case with the social worker. She suggested that Mother had moved to Concord to avoid an intervention the family was trying to organize. K.S. told the social worker I.S. had suffered "too many back to back injuries," and she warned that Mother's word could not be taken as the "gospel truth." K.S. confirmed she had adopted Mother from an orphanage after Mother had been "severely emotionally and physically abused." K.S. reported that Mother had unaddressed anger issues: "I saw the anger in her face when [I.S.] was an infant." She also told the social worker Mother had "never held any kind of job," yet always had money. She reported that "[d]rugs were a big part of [Mother's] life when she was in the Bay Area." In addition, K.S. said, Mother had been involved in "bad activities" in San Francisco, referring to the exotic dancing.

On February 6, 2014, Mother pled no contest to jurisdiction under section 300, subdivision (b), based on two counts: (1) her "history of marijuana use" affecting her ability to care for I.S.; and (2) her "history of mental health issues," with both factors admittedly placing I.S. "at risk of harm." A social worker's report prepared for the disposition hearing showed Mother had been subject to five previous referrals to child welfare authorities in Placer and Sacramento Counties, all having been resolved as inconclusive, unfounded, or closed due to loss of contact with Mother. The same report showed a history of seven arrests and six misdemeanor convictions for assault and battery (Pen. Code, §§ 240, 242), loitering with intent to commit prostitution (Pen. Code, § 653.22, subd. (a)), and disturbing the peace (Pen. Code, § 415).

Despite her unfortunate background, the disposition report also noted Mother's "many strengths," including her "ability to seek out resources and demonstrate initiative,"

[4] In April 2014, I.S.'s father decided he wanted to be involved in the proceedings and was granted twice monthly supervised visitation. His visitation was suspended at the six-month review after he showed little interest in visiting I.S. and stopped communicating with the Bureau.

her "proactive" attitude toward engaging in services since I.S.'s detention, her consistently clean drug tests, and her engagement in individual counseling, parenting classes, and 12-step meetings.

I.S. himself was generally doing well in foster care, with some indication of temperamental behavior and a possible delay in language acquisition. He had been taken in for a skeletal survey, which showed a "healing fracture [of the] proximal left tibia," presumably a reference to the recent leg fracture. No other injuries were noted.

Despite Mother's early progress in reunification, the juvenile court ordered I.S. removed from Mother's care, finding by clear and convincing evidence that removal was necessary under section 361, subdivision (c)(1).[5] The social worker requested an early reevaluation after three months to assess Mother's progress, in anticipation of possibly approving unsupervised visitation.

A.S. was born in early March 2014, having been conceived when Mother was raped at a house party after someone apparently put a sedative or narcotic in her drink. Throughout most of the dependency, Mother claimed she did not know the father's identity. In September 2015, she did give the social worker the name of an alleged father, but claimed she had no information on how to locate him. A name search resulted in so many matches that the Bureau suspended its attempt to locate him.

The Bureau soon received a referral expressing concern about Mother's ability to care for her newborn, so on March 10, 2014, a social worker went to Mother's home unannounced. In discussing I.S.'s past injuries, Mother acknowledged she may have exercised poor judgment in allowing I.S. to jump on a trampoline with older children.

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[5] That subdivision reads in pertinent part as follows: "(c) A dependent child shall not be taken from the physical custody of his or her parents or guardian or guardians with whom the child resides at the time the petition was initiated, unless the juvenile court finds clear and convincing evidence of any of the following circumstances . . . :

"(1) There is or would be a substantial danger to the physical health, safety, protection, or physical or emotional well-being of the minor if the minor were returned home, and there are no reasonable means by which the minor's physical health can be protected without removing the minor from the minor's parent's or guardian's physical custody. . . ." (§ 361, subd. (c)(1).)

After a lengthy interview and observation, the social worker remained concerned that Mother could not responsibly care for A.S.

On March 24, 2014, the Bureau filed a petition on A.S.'s behalf under section 300, subdivisions (b) (failure to protect) and (j) (abuse or neglect of a sibling). A.S. was detained the next day and placed in the same foster home with I.S. On April 29, 2014, Mother pled no contest to the jurisdictional allegations under subdivision (j) based on I.S.'s dependency. (§ 300, subd. (j).)

On May 27, 2014, the Bureau prepared an updated memorandum for an interim hearing in I.S.'s case that was extremely positive, indicating Mother was in full compliance with her case plan: she was testing clean for drugs, was in a recovery program, was receiving mental health therapy, and visits were going well. Ujima Central Mother's Program reported that Mother was "able to anticipate and meet [her] child[ren]'s needs," "able to appropriately supervise [her] children," "able to demonstrate positive age appropriate interactions with [her] children," and "able to identify potential hazards and create a safe environment for [her] child[ren]." Mother's therapist reported Mother was "actively engaged in treatment" and had "done everything she can" in therapy. He did not see symptoms of bipolar disorder or psychosis. Mother also completed a psychiatric evaluation in March 2014 and was diagnosed with PTSD. Based on her significant progress, the Bureau requested authorization to allow Mother to have unsupervised visits with I.S.

On June 3, 2014, the Bureau filed a similarly positive disposition report in A.S.'s case, commending Mother on her progress and her "consistent and enthusiastic engagement" in services. She had completed required parenting classes and enrolled voluntarily in an additional class geared specifically to parenting an infant. Mother had completed one quarter at Heald College, studying business administration, and she had reenrolled in April 2014. The social worker assessed Mother as "intelligent and resourceful." She had been "proactive" in working with the Bureau and her visits with A.S. were "consistently positive," with "no safety concerns" and "no inattentiveness" on Mother's part.

Based on Mother's progress, the Bureau recommended that, while A.S. should remain out of the home, Mother should be allowed unsupervised visits. On June 3, 2014, the court ordered A.S. removed from Mother's care, making the necessary finding under section 361, subdivision (c)(1) by clear and convincing evidence. (See fn. 5, *ante*.) The court ordered both children to remain in foster care, with reunification services for Mother, but allowed her unsupervised visits with both children in the Bureau's discretion.

In a report for I.S.'s six-month review hearing on August 14, 2014, Mother was again said to have made "significant progress." She was living in Concord in the same living arrangement she had maintained when I.S. was detained. Mother had also completed two successful unsupervised visits with the children, and the court granted the Bureau authority to set up overnight visits, provided it first verified that Mother's housing and roommates were appropriate. When one roommate would not agree to a background check, Mother took the money she had saved to buy a car and used it to rent a two-bedroom apartment in Concord instead, where the overnight visits with I.S. were allowed to begin. The court set I.S.'s 12-month review for January 29, 2015.

As of the six-month review in A.S.'s case, conducted December 4, 2014, Mother was still testing negative for drugs and was engaged in mental health services and parenting classes. Since early November 2014, Mother had been employed as a waitress at an upscale restaurant in San Francisco.[6] Visits with both children were going "very well." Mother had "progressed a lot" and was "more confident in parenting skills."

The Bureau's report noted, however, that on October 6, 2014, I.S. had been in a vehicle accident while playing unattended in a pickup truck. The truck rolled backward into the street and hit another parked truck. I.S. was taken to the doctor the next day, who reported "[n]o injuries or other concerns." Mother explained that she had got behind on her PG&E bill and her service was turned off. She had driven to the house in Concord where she had previously lived to take a shower. She asked both the homeowner and

[6] Mother kept her waitress job in San Francisco through the early part of 2015, but then took on a part-time job at Target. She ended her job at Target on August 5, 2015.

another resident to keep an eye on I.S. while he played in the truck, and the accident occurred while she was in the shower.

Despite Mother's progress, the report concluded she needed help with impulse control and problem-solving skills, as well as help in safely caring for her children. The court continued A.S. in foster care and set an interim review hearing for the same date as I.S.'s 12-month review.

In its report for the joint hearing on January 29, 2015, based on Mother's "continuing" and "significant" progress, the Bureau recommended that the children be returned to her, with family maintenance services. Mother had been cooperative throughout therapy and had been working on her PTSD issues. Additional psychological testing had preliminarily shown Mother had "the ability to be a fit parent" and concluded there was no reason not to return the children to her. The social worker had received "only positive reports" from the various service providers to whom Mother had been referred.

It was again reported that I.S.'s speech was delayed, however, and he was below age level for receptive and expressive language skills. He qualified for Early Start Intervention services that would transition him to public school services at age three. I.S. had also been throwing tantrums, which Mother admitted triggered her own childhood trauma and left her feeling unable to act. No concerns about A.S.'s growth or development were raised.

On March 24, 2015, the court ordered the children returned home, with family maintenance services, and a family maintenance review hearing set for September 15, 2015. (§ 364.)

In the ensuing six months, however, the Bureau's assessment of Mother's efforts and prospects changed dramatically. Mother stopped regular drug testing in April 2015 and stopped seeing her therapist after July 20, 2015, as she had moved to a new residence in Antioch in early July. From mid-April 2015 to mid-September 2015, she tested only sporadically and missed ten drug tests altogether. She missed therapy for approximately two months.

In connection with the September 15 hearing, the Bureau filed a memorandum reporting that Mother was no longer in compliance with her family maintenance plan. Mother was again pregnant with the child of a new boyfriend, who was a heroin addict and "known . . . dealer." She had moved with her children into the garage of a home in Antioch owned by the new boyfriend's mother, where several other residents were active heroin users. The garage door had a padlock on the outside, so that she and the children could be locked in with no means of escape in the event of an emergency, and she told a service provider that the father of her unborn child had locked them in before. The Bureau was concerned that Mother reportedly did not perceive this to be a safety issue. The social worker also reported that if the family were locked in the garage, they would have no access to food, water or bathroom facilities. On the other hand, when the door into the house was unlocked, Mother allowed the children to wander through the house without adequate supervision. In addition, the father of her unborn child was allowed to come and go in the home and was reported to use heroin in the house where the children were living.

The Bureau's memorandum also reported that, on August 3, 2015, Mother had been involved in a physical confrontation with a woman called "KK," who was apparently a rival for Mother's boyfriend's affections. Although the Bureau insists that Mother was the "instigator" of the confrontation, the record shows only that Mother confronted the woman verbally outside the Antioch home of her boyfriend's mother. KK responded by slashing Mother's cheek with a knife or other sharp instrument that left her bleeding and on her way to the hospital, where stitches were required. It is unclear from the record whether this happened in front of the children.[7] Part of the Bureau's

[7] Mother initially told the police her children were inside the house when the confrontation occurred. Mother ultimately testified that a friend of hers had taken the children overnight the day before, due to her morning sickness. She said her children were not present during her confrontation with KK, but had arrived back at the house before the police got there.

dissatisfaction with Mother was that she purportedly did not cooperate with the police when they tried to investigate the incident with KK.

On September 4, 2015, I.S.'s mental health case manager, Carol Rossi, had sent an email to the Bureau expressing concern for the children's safety. Rossi repeated concerns about the family's living quarters in the garage. It was reported that Mother got into verbal altercations with her boyfriend's family in the presence of the children and did not see that as a problem, and she was equally unconcerned if the children witnessed physical abuse among the adults in the home. Mother had admitted to Rossi that she sometimes left the children in the care of drug abusers. Rossi further noted that neither Mother nor the children had been receiving therapy at a treatment level for at least four months. According to Rossi, Mother was "not sufficiently meeting her children's ongoing mental health needs."

On September 10, the boyfriend's mother kicked Mother and the children out of her home, and Mother moved to Oakland with the children and was staying with her boyfriend's grandmother. Two Bureau workers noticed bruising around A.S.'s eye during a home visit on September 11, which Mother said A.S. had sustained by falling out of her bed or playpen. There was also an abrasion on I.S.'s forehead where A.S. had hit him. The children were detained by the Bureau on September 11, 2015.

On September 15, 2015, the Bureau filed a supplemental petition under section 387, and the court ordered the children detained. Such a petition is utilized when the Bureau claims "the previous disposition has not been effective in the rehabilitation or protection of the child." (§ 387, subd. (b).)

In addition to the missed drug tests and hiatus from therapy, the jurisdiction report noted there had been two hotline reports that the children were not being adequately supervised and in one instance reportedly were eating off the floor while Mother lay in bed. Another hotline report indicated Mother had been involved in arguments with her boyfriend's family in front of the children, including yelling and profanity.

On October 6, 2015, Mother pled no contest in a mediated resolution to the section 387 petition, and the court sustained it on grounds that Mother had "failed the conditions

of the Court Ordered Family Maintenance Plan" based on the missed drug tests and therapy, failed to provide "a safe and stable home for herself and her children," and put her children at risk due to the confrontation with KK.

A disposition report for the section 387 petition, in addition to the matters discussed above, characterized Mother as having an "ongoing pattern of instability"—noting she had moved three times since the children were returned to her. The report alleged she made "poor judgments on behalf of herself/children," and concluded her "thought process is impeded due to severe trauma she has endured in the past." The Bureau recommended that the children again be removed from Mother's home and that a hearing under section 366.26 be set.

The report revealed that Rachel Hardin, the family therapist treating Mother and her children, expressed concern that she had to consistently help Mother "put out fires" because Mother continued to operate in "survival mode." Hardin opined that the children needed their mother's "undivided attention" and suggested Mother had a "long ways to go" in safely parenting her children.

By the time of the disposition hearing, I.S. was being assessed for autism spectrum disorder and intellectual delay, but he did not meet the criteria. Intelligence testing showed he was in the low average range in several areas. His overall adaptive functioning was in the extremely low range, and he did meet the criteria for a language disorder associated with prenatal alcohol exposure. I.S. had also been referred for emotional and behavioral therapeutic services to help with his tantrums and aggressive behaviors.

At a contested disposition hearing on December 3, 2015, the Bureau submitted the matter based on the social worker's report. Katrina Bill, the social worker who had authored all of the reports relating to the section 387 petition, was questioned by Mother's counsel. Bill testified that Mother was no longer living in the garage described above, but now lived on Harrison Street in Berkeley (Harrison House), in a group living arrangement through Building Opportunities for Self-Sufficiency (BOSS). BOSS provided classes in anger management, parenting, cognitive behavioral therapy, and other

subjects. Bill testified Mother had not missed any visits with the children, never missed a drug test, and never tested positive since the supplemental petition was filed. So far as Bill knew, Mother had not relapsed.[8]

Mother testified on her own behalf, explaining that she stopped showing up for drug tests because she had just found out she was pregnant with her third child and she had terrible morning sickness and fatigue. She said the move to Antioch was necessitated when the owner of the apartment where she had been living in Concord decided to sell the building. She moved into the garage in Antioch as a "last resort." When she moved to Antioch she also stopped participating in therapy because her therapist's office was too far away. Her therapist offered to help her find a new therapist in Antioch, but by the time she received the referral, she was in the process of moving temporarily to Oakland and felt there was no point in starting therapy in Antioch.

Mother further claimed that she and the children could not be locked into the garage in Antioch because the door between the garage and the laundry room could not be locked effectively due to the configuration of the door.[9] She also explained that the padlock was only used to keep the garage door secure; otherwise, it would not stay closed.

Mother confirmed she was now living at Harrison House, and although she was not yet involved in the available classes, she planned to participate after her baby, due in January 2016, was born. She also testified that BOSS would allow her children to move in with her, and a case manager would be available to help oversee her children's safety and her compliance with her case plan. She was in a six-month program at Harrison House but expected to be able to apply to transition into a more long-term living arrangement after her baby was born.

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[8] Mother testified affirmatively that she had not used any illegal substances since before she became pregnant with I.S. This much is certainly subject to doubt in light of her admissions to the social worker and her no contest plea to jurisdiction over I.S.

[9] The social worker also testified there was a door from the garage into the laundry room, but it, too, locked from the outside.

At the conclusion of the hearing, the children's counsel agreed with the Bureau that Mother was not ready to take I.S. and A.S. back into her home.

The court then found by clear and convincing evidence that "[t]here is substantial danger to [the] child[ren]'s physical health, or would be if [the] child[ren] were returned home, and there are no reasonable means to protect [them] [without] removal of physical custody." The judge said: "I have carefully reviewed this report, listened to the testimony today. I'm impressed that mother has goals and desires she would like to meet. It appears she loves her children, but she's not ready to have the children back now. The time has run out of extending it. 18 months is clearly up.[10] And for one child it will be 24 months next month and the other one two months later. Mother is clearly not in a position where she could have the children returned to her. [¶] So I am not going to—I am going to follow the recommendations provided by the Department."

In accordance with rule 5.565(f), the court set a hearing under section 366.26 for March 24, 2016. Through this petition, Mother challenges the disposition order and the order setting the hearing on termination of her parental rights.

DISCUSSION

Mother contends there was insufficient evidence to support the juvenile court's disposition order and order setting a hearing under section 366.26. At the outset, the parties do not agree on the burden of proof that applied in the trial court. Mother contends the court was required to find, by clear and convincing evidence,[11] "substantial danger to the child," and "no reasonable way to protect the child in the home," citing section 361, subdivision (c)(1). (See fn. 5, *ante*.) The rationale for why section 361 applies runs as follows: the Rules of Court call for a bifurcated proceeding in disposing of a section 387 petition. First the court adjudicates what is sometimes called the

[10] I.S. entered foster care on January 3, 2014, and A.S. entered foster care on March 25, 2014. (§ 366.49.)

[11] "Clear and convincing evidence is evidence that establishes a high probability and leaves no substantial doubt." (*In re Karla C.* (2010) 186 Cal.App.4th 1236, 1243.) It must be sufficiently strong to command the " ' " 'unhesitating assent of every reasonable mind.' " ' " (*Ibid.*; accord, *In re Jerome D.* (2000) 84 Cal.App.4th 1200, 1205.)

"jurisdictional" issue under section 387, namely whether the prior disposition was ineffective in protecting the child, making findings on both the facts alleged in support of that conclusion and the ultimate jurisdictional issue itself. (Rule 5.565(e)(1); see *In re A.O.* (2010) 185 Cal.App.4th 103, 110 (*A.O.*).) If the court sustains the petition, it proceeds to the dispositional phase of the bifurcated proceeding. Rule 5.565(e)(2) provides in part: "The procedures relating to disposition hearings prescribed in chapter 12, article 3 apply to the determination of disposition on a subsequent or supplemental petition." One rule in chapter 12, article 3 is rule 5.695(d), which mirrors section 361, subdivision (c) in requiring proof by clear and convincing evidence before a child may be removed from a parent in whose physical custody the child resided when the petition was filed.[12]

The Bureau, however, argues that when a child has once been removed on a section 300 petition (the finding under section 361 having been made), and he or she is later returned to the parent under Bureau supervision, if it becomes necessary to remove the child again on a supplemental petition under section 387, the preponderance of the evidence standard applies. In advocating that position it relies exclusively on *A.O., supra,* 185 Cal.App.4th at pages 111–112, which, in turn, distinguished cases such as those cited in foonote 12, *ante,* on grounds that they involved situations in which the child or children had not been removed from the parental home at the disposition of the original petition under section 300, and therefore no previous finding had been made

[12] Mother's position is also supported, at least superficially, by frequent reference in the case law to the applicability of the standards of section 361, subdivision (c) when adjudicating a section 387 petition that results in removal of a child from a parent. For instance: "If, at the section 387 adjudication, the court finds the previous disposition was not effective in the protection or rehabilitation of the child, the court is required to hold a disposition hearing. [Citation.] *If the proposed removal of the child is from a parent or guardian, the court must apply one of the applicable standards found in section 361, subdivision (c).*" (*In re Javier G.* (2006) 137 Cal.App.4th 453, 462, italics added.) Other cases contain language to like effect. (See *In re Suhey G.* (2013) 221 Cal.App.4th 732, 741, fn. 20; *In re T.W.* (2013) 214 Cal.App.4th 1154, 1163; *Kimberly R. v. Superior Court* (2002) 96 Cal.App.4th 1067, 1077; *In re Paul E.* (1995) 39 Cal.App.4th 996, 1000–1003.)

under section 361, subdivision (c). (*Ibid.*) *A.O.* appears to have concluded their holdings should be limited to those circumstances, but as yet no published case has followed its lead.[13]

We need not take part in this debate to rule on the present petition. The findings required by section 361, subdivision (c)(1), were made in this case by clear and convincing evidence at the disposition hearing on the section 387 petition. We shall assume without deciding that the juvenile court employed the correct standard, an assumption that benefits Mother. But that raises a different question not addressed by the parties, namely whether that burden of proof in any way affects our consideration of the petition. On that point, too, we find the appellate courts divided.

Everyone agrees that a substantial evidence standard of review applies.[14] (E.g., *F.S.*, *supra*, 243 Cal.App.4th at p. 811; *Kimberly R. v. Superior Court*, *supra*, 96 Cal.App.4th at p. 1078.) But the courts do not speak with one voice when describing how that standard is to be applied in dependency cases when the clear and convincing burden of proof was required at trial. Some cases hold the clear and convincing standard "disappears" on appellate review. (E.g., *F.S.*, *supra*, 243 Cal.App.4th at p. 812; *In re J.S.* (2014) 228 Cal.App.4th 1483, 1493; *In re J.I.* (2003) 108 Cal.App.4th 903, 911; *Sheila S. v. Superior Court* (2000) 84 Cal.App.4th 872, 880–881.) Others suggest, however, that

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[13] *A.O.* has been cited in only one published case: *In re F.S.* (2016) 243 Cal.App.4th 799, 808 (*F.S.*). In *F.S.*, however, the reference to the preponderance standard appears to apply only to the findings on the adjudicatory or jurisdictional phase of the bifurcated proceeding. *F.S.* does seem to acknowledge the clear and convincing standard applies to the dispositional findings. (*Id.* at p. 812.)

[14] Substantial evidence is not synonymous with *any* evidence, however; a "mere scintilla" of evidence is not sufficient to support a judgment or order. (*In re David M.* (2005) 134 Cal.App.4th 822, 828.) Rather, substantial evidence is that which is of ponderable legal significance, reasonable in nature, credible, and of solid value. (*In re Dakota H.* (2005) 132 Cal.App.4th 212, 228; *F.S.*, *supra*, 243 Cal.App.4th at pp. 811–812.) And, " ' "[w]hile substantial evidence may consist of inferences, such inferences must be 'a product of logic and reason' and 'must rest on the evidence' [citation]; *inferences that are the result of mere speculation or conjecture cannot support a finding*." ' " (*In re David M.*, *supra*, at p. 828.)

we conduct our substantial evidence review "bearing in mind" the heightened burden of proof in the trial court. (E.g., *In re Hailey T.* (2012) 212 Cal.App.4th 139, 146; accord, *In re Alvin R.* (2003) 108 Cal.App.4th 962, 971; *In re Kristin H.* (1996) 46 Cal.App.4th 1635, 1654.) It is a nuanced distinction but one that could make a difference in a close case. Again, however, we find we need not decide which is the better rule, for even applying the approach most favorable to Mother does not entitle her to the relief she seeks. Thus, for purposes of our review, we shall treat the question before us as whether, considering the evidence most favorably to the Bureau, there is substantial evidence in the record that could reasonably support the factual finding of risk to the children's safety to a clear and convincing standard. (See *In re Henry V.* (2004) 119 Cal.App.4th 522, 529; *In re Isayah C.* (2004) 118 Cal.App.4th at 684, 694; fns. 5 & 11, *ante*.) Even applying that more demanding formulation, we conclude the juvenile court did not err in ordering the children removed from Mother on the section 387 petition.

The evidence in this case was decidedly mixed. Mother had demonstrated devotion to her children and—at least for a substantial time—tremendous progress in overcoming her parenting difficulties. We agree with the Bureau's early assessment that Mother appears to be intelligent, resourceful, resilient, proactive and determined. Above all, we discern throughout the record Mother's deep love for her children.

On the other hand, Mother's poor anger management and fragile mental health were legitimate concerns, as was her overall judgment in making decisions concerning her children. Mother allowed 20-month-old I.S. to jump on a trampoline with older children, resulting in a broken leg. She allowed I.S. at age two-and-a-half to play in a pickup truck alone, resulting in a vehicle accident that only by luck did not injure him or someone else.

With respect to the allegations concerning events after she regained physical custody of the children, evidence favoring Mother showed she again had been testing clean for drugs consistently from late August 2015 through the disposition hearing. She was back in therapy with the same therapist she had seen earlier. That therapist expressed the view that "[a]head of psychological concern, I believe, is the simple matter

of her lack of material resources and ability to procure them ongoing." She had a place to live at Harrison House that would, according to her, accept her children and provide support, structure and supervision for the family. Her innate strengths, recounted in detail above, presumably remain intact.

On the other hand, the evidence against Mother undeniably showed she stumbled in her progress between April and September 2015. After the children were returned to her, Mother again became involved in physical and verbal altercations, she became pregnant by a heroin addict and allowed him to use drugs around her children, and she failed to appreciate the risk involved in moving her family into a garage that allowed them all to be locked in without an exit. These were poor choices; she admits she has not always exercised good judgment on behalf of her children. There were again injuries to the children, though relatively minor. And the underlying reasons for the dependency ―Mother's marijuana use and mental health issues―were not being addressed during those months. Importantly, Mother's living arrangement, and how long it would last, were still somewhat unsettled at the time of the disposition hearing. In light of I.S.'s special needs, we think it fair to infer it is especially important for him to have a stable living arrangement and a vigilant parental figure. And although Mother provided explanations for the children's injuries and her own lapses in judgment, as well as predictions of her upcoming housing prospects, the record raises concerns about her credibility, the assessment of which was a matter for the trial judge, whose judgment we will not disturb. (See *In re Juan G.* (2003) 112 Cal.App.4th 1, 5–6; *In re E.L.B.* (1985) 172 Cal.App.3d 780, 788.) Mother was also expecting a third child in January 2016, and the social worker believed she needed to devote her full attention to her own mental health needs and presumably the needs of her new baby.

The juvenile court, not this court, was primarily responsible for deciding whether Mother's missteps showed she could not safely resume custody of her children. Once the judge became firmly convinced the children would not be safe in Mother's care if

immediately returned to her, his only option was to set a hearing under section 366.26. (Rule 5.565(f).) Mother's time for further extensions had run out.[15]

Our role is limited to deciding whether the juvenile court's decision not to return the children to Mother at disposition was supported by substantial evidence. Given the factors recited above, we conclude it was, even taking into account the heightened burden of proof at trial. The evidence was sufficient to inspire in a reasonable person a firm conviction based on admissible and convincing evidence that the children were at risk. Hence, the order setting the section 366.26 hearing also was proper.

DISPOSITION

The petition is denied on the merits. (See § 366.26, subd. (*l*)(1)(C); rule 8.452(h).) The request for a stay of the March 24, 2016 hearing is denied. Our decision is final as to this court immediately. (Rule 8.490(b)(2)(A).)

_____
Streeter, J.

We concur:

_____
Reardon, Acting P.J.

_____
Rivera, J.

[15] Because of the children's young age, Mother was initially entitled to only six months of reunification efforts, which could be extended to a maximum of 18 months. (§§ 361.5, subd. (a)(1)(B), 366.21, subds. (e), (f), & (g), 366.22, subd. (a).) Based on their dates of entry into foster care (see fn. 10, *ante*), the 18-month maximum had already expired for both children.